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November 26, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petition for Forbearance of the Verizon Telephone Companies, CC Docket No. 01-338

Dear Ms. Dortch:

On behalf of the Verizon Telephone Companies ("Verizon") please find attached an original and four copies of the Reply Comments of Verizon to be filed in the above-referenced proceeding.

Should there be any questions, please contact me at 202.663.6850.

Respectfully submitted,

J E Nuechterlein

Jonathan E. Nuechterlein

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Petition for Forbearance of the Verizon	)	CC Docket No. 01-338
Telephone Companies	)	

REPLY COMMENTS OF VERIZON

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November 26, 2003

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REPLY COMMENTS OF VERIZON

Introduction and Summary

This proceeding presents issues of extreme urgency. Verizon is poised to begin deployment of fiber-to-the-premises facilities in early 2004, and it has already signed agreements with equipment suppliers and contractors. It has done so in the expectation that the Commission will align its rules with its policy against subjecting broadband elements to unbundling obligations. The Commission should thus immediately resolve the issues presented by this "new" forbearance petition, which in fact have been pending for more than a year.[1]

In the *Triennial Review Order*, the Commission recognized that it could not apply section 251 unbundling obligations to certain broadband-specific elements, explaining that the broadband market is already subject to intense intermodal competition, that competitive local exchange carriers ("CLECs") can and do offer broadband services without access to those

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[1] In its Public Notice, "Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271," CC Docket No. 01-338, FCC 03-263 (rel Oct. 27, 2003), the Commission denied Verizon's original July 2002 forbearance petition and treated Verizon's October 24, 2003 *ex parte* as a new petition for forbearance. Verizon has separately appealed the Commission's denial of the original petition as an evasion of the 12-15 month statutory deadline set forth in 47 U.S.C. § 160(c). *See Verizon Tel. Cos. v. FCC*, No. 03-1396 (D.C. Cir. filed Nov. 5, 2003).

elements, and that unbundling obligations are inimical to the prospects for further broadband investment. Such obligations, no matter what their statutory provenance, would thus thwart the Commission's goal under section 706 of ensuring a wireline broadband alternative to cable modem service, which increasingly occupies "a leading position in the [broadband] marketplace."[2] As Verizon explained in its October 24 *ex parte*, the *Triennial Review Order* establishes the complete predicate for forbearance from any residual unbundling obligation that might otherwise be found to apply to such elements under a wooden application of section 271.[3] A finding that such obligations persist under section 271 after they have been eliminated as anti-investment and anti-consumer under section 251 is a *reason to grant* forbearance from those obligations under all three criteria of section 10(a). It is not, as several CLECs here submit, a coherent basis for reflexively preserving whatever obligations section 271 is thought to impose in the *absence* of forbearance.

Much of the opposition to Verizon's forbearance request thus reduces to the claim that the Commission did not really mean what it said when it took these elements off the table under section 251. Specifically, in attacking the basis for forbearance under section 10(a), the opponents manage only to quarrel with the Commission's twin policy findings that compelled unbundling of broadband-specific elements is both unnecessary for competition and affirmatively harmful to the public interest in the development of alternatives to cable modem service.

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2 Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, FCC 03-36 ¶ 292 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

3 *See* Letter from Susanne A. Guyer, Verizon, to Chairman Powell and the Commissioners, FCC, CC Docket No. 01-338 at 3, 6 (filed Oct. 24, 2003) ("October 24 *ex parte*").

There is likewise no merit to the opponents' claim that this forbearance petition is somehow at odds with Verizon's underlying advocacy in the *Triennial Review* proceeding. Verizon and other ILECs there observed that they will have strong incentives to recoup their massive capital expenditures by keeping as much broadband traffic as possible on their networks by providing wholesale as well as retail broadband services on commercially reasonable, negotiated terms. The opponents of forbearance now ask why Verizon would seek to avoid *unbundling obligations* for broadband elements, governed by the standards of section 201. *See Triennial Review Order* ¶ 253. The straightforward answer is that, as Verizon has previously explained at length, voluntarily negotiated wholesale service offerings are fundamentally different from unbundling requirements because, among other things, the latter would require major alterations in an ILEC's systems and network architecture, and it would inject additional costs, complexities and regulatory uncertainty into an already risky undertaking. All of this, which is simply ignored by the CLECs, would serve only to delay or deter widespread deployment of broadband.

In turning from policy to law, the opponents of forbearance skate from thin ice into open water. First, there is no substance to the opponents' arguments about section 10(d). Although they suggest otherwise, Congress conditioned forbearance from given "requirements of . . . section 271" on a showing that "*those* requirements"—not *all* section 271 requirements—"have been fully implemented." 47 U.S.C. § 160(d) (emphasis added). Thus, when a Bell company seeks forbearance from particular checklist requirements, the question is whether *those checklist* requirements have been fully implemented. And the answer is necessarily yes if the Commission has found, as the express prerequisite to granting a section 271 application, that the Bell company "has fully implemented the competitive checklist." 47 U.S.C. § 271(d)(3)(A)(i). That is presumably one reason why the Commission took pains in its recent *OI&M Forbearance Order* to stress that its analysis there of section 10(d) addressed only "whether section 271 is 'fully implemented' with respect to the cross-referenced requirements of section 272, and does *not* address whether any other part of section 271, *such as the section 271(c) competitive checklist*, is 'fully implemented.'"[4]

The CLECs do not deny that the "normal rule of statutory construction" is "that identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)). That normal rule is all but compulsory where, as here, the use of identical language cannot be coincidental because one provision (section 10(d)) explicitly cross-references the other (section 271). In response, the CLECs rely on cases in which (i) there was no similarly obvious statutory cross-reference and thus no guarantee against mere coincidence *and* (ii) application of the same-meaning rule would produce "an absurd result" or would otherwise thwart the statutory scheme. *Cellular Telecomm. & Internet Ass'n v. FCC*, 330 F.3d 502, 511 (D.C. Cir. 2003). Here, construing the term "fully implemented" as having the same meaning in sections 10 and 271 would produce not an absurd result, but an eminently sensible one, because it would enhance the Commission's authority to act in what it determines to be the public interest. In particular, construing the term "fully implemented" identically in these two provisions would remove (with

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4 Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149, FCC 03-271 ¶ 6 (rel. Nov. 4, 2003) ("*OI&M Forbearance Order*") (emphasis added). Verizon disagrees with the Commission's basis for denying forbearance in that proceeding, but it nonetheless agrees with the Commission's finding that its decision has no bearing on the circumstances in which forbearance from checklist requirements is appropriate.

the grant of a section 271 application) any section 10(d) barrier to the Commission's authority to decide for itself whether forbearance from checklist requirements meets the independent standards of section 10(a).

The CLECs' next claim is that section 271(d)(4), which precludes the Commission from "limit[ing] or extend[ing] the terms used in the competitive checklist," trumps the Commission's forbearance authority under section 10. This too is nonsense. Section 10 not only grants the Commission broad authority to forbear from applying "*any* provision" of the Communications Act, 47 U.S.C. § 10(a) (emphasis added), but also cross-references section 271 explicitly and specifies the circumstances in which forbearance from "the requirements . . . of section 271" is appropriate, 47 U.S.C. § 160(d). Section 271(d)(4) addresses the checklist showing required to obtain long distance authority and makes clear that the showing cannot be enlarged (or diminished) by the Commission. Once the required showing has been made, however, that provision is satisfied. Section 271(d)(4) says nothing whatsoever about the Commission's authority to *forbear* once the required showing has been made. Indeed, at that point (as addressed further below), the checklist requirements have been "fully implemented" by the express terms of section 271, and the Commission is expressly authorized to forbear by the terms of section 10(d). This reading places sections 10 and 271(d)(4) in harmony; the CLECs' contrary reading would place them in needless contradiction.

Finally, any doubt on these or other issues would be resolved by section 706 of the 1996 Act, which "direct[s] the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services."[5] The CLECs have no meaningful response to this point. Although obscure, their argument appears to be that (i) section 706 can affect the section 251 unbundling inquiry only because section 251(d)(2) contains an "at a minimum" clause that permits consideration of issues other than "impairment," (ii) section 271 contains no such clause, and (iii) section 706 is therefore irrelevant to any construction of section 271. This argument would make no sense even if Verizon had invoked section 706 solely as a basis for interpreting section 271, but in fact Verizon invoked section 706 as a basis for, in the Commission's own words, "us[ing] . . . the *forbearance authority under section 10(a)* to encourage the deployment of advanced services." *Id.* (emphasis added). Section 706 plainly warrants a broad interpretation of the Commission's discretion to forbear from regulations that, in its view, preclude the development of broadband services.

Discussion

I. The Commission Should Forbear From Enforcing Any Stand-Alone Unbundling Obligation Arising From Section 271 With Respect To Broadband Elements.

The CLECs' arguments against forbearance fall into two general categories: (i) arguments that forbearance would violate the policy-oriented criteria of section 10(a), and (ii) arguments that forbearance would violate the legal prohibitions of section 10(d) or section 271(d)(4). None of these arguments has merit.

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5 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, 24044-45 ¶ 69 (1998) ("*Advanced Services Order*"), *aff'd in part, vacated on other grounds, GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000).

A. The Commission's Determinations In The Triennial Review Order Establish The Complete Basis For Forbearance Under Section 10(a).

A proper analysis of the section 10(a) criteria begins with an undisputed and judicially recognized industry reality: "The Commission's own findings . . . repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market."[6] Indeed, the Bell companies not only trail the cable companies in the market, but are falling farther behind them. "[M]ore consumers continue to obtain their high speed Internet access by cable modem service than by xDSL, and the rate of growth for cable modem subscribership continues to outpace the rate of growth for xDSL subscribership." *Triennial Review Order* ¶ 292. What Verizon seeks in this forbearance proceeding is the same stable environment, free of broadband unbundling obligations, that cable companies now enjoy.

In claiming that forbearance is nonetheless unwarranted under the substantive criteria of section 10(a), the CLECs make many arguments, but they all reduce to two basic claims: first, that CLECs need rights of access to broadband elements in order to compete and, second, that ILECs do *not* need assurances of a stable deregulatory environment before spending billions of dollars to upgrade their networks. The *Triennial Review Order* rejects each of those arguments. As an initial matter, as the Commission found, there is no basis for imposing an unbundling obligation in the broadband market given "the existence of a broadband service competitor with a leading position in the marketplace." *Triennial Review Order* ¶ 292. Indeed, it would be senseless to blunt the wireline challenge to the dominant cable modem providers by subjecting

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6 *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002), *cert. denied sub nom. WorldCom Inc. v. USTA*, 71 U.S.L.W. 3416 (U.S. Mar. 24, 2003) (No. 02-858).

the Bell companies alone to intrusive unbundling obligations. *See USTA*, 290 F.3d at 428-29 (vacating line-sharing rules because of prevalance of intermodal broadband competition).

Moreover, even apart from the dominance of cable competitors in the broadband market, the *Order* finds that "competitive LECs are *leading* the deployment of FTTH" without help from the ILECs. *Id.* ¶ 278 (emphasis added). As to the packetized functionality of copper-fiber hybrid loops, the *Order* flatly rejects the long-standing CLEC claim "that, without unbundled access to hybrid loops, competitive LECs will not be able to serve certain customers," and it "determine[s] that unbundled access to incumbent LEC copper subloops," combined with the "availability of TDM-based loops," is more than enough to "provide competitive LECs with a range of options for providing broadband capabilities." *Triennial Review Order* ¶ 291 & n.839; *see also id.* ¶ 295.

The *Order* also decisively finds that unbundling requirements "tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology." *Id.* ¶ 3. It thus concludes that relief from broadband unbundling requirements is necessary to "promote investment in, and deployment of, next-generation networks," *id.* ¶ 272, because "incumbent LECs are unlikely to make the enormous investment required [by broadband deployment] if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment," *id.* ¶ 3. Accordingly, the *Order* "eliminate[s] most unbundling requirements for broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire." *Id.* ¶ 4.

Although the CLECs continue to disagree with them, these findings conclusively establish that the three criteria of section 10(a) are satisfied: *i.e.*, that continued unbundling is unnecessary to protect either consumers or competitors (47 U.S.C. § 160(a)(1), (2)), and that forbearance is in the public interest (47 U.S.C. § 160(a)(3)). The Commission's finding that ILECs are falling further behind cable companies in the provision of broadband services, *id.* ¶ 292, together with its observation that the Commission's rules will "provide competitive LECs with a range of options for providing broadband capabilities," *Triennial Review Order* ¶ 291, conclusively answer any concern about whether any vestigial broadband unbundling obligation is needed to protect competitors for purposes of section 10(a)(1). *See also* pp. 14-15, *infra* (discussing Commission plans to regulate wholesale service offerings under section 201 and 202). And the remaining criteria are all satisfied for the simple reason that the Bell companies—the nation's best chance for a broadband alternative to the market-dominant cable modem providers—"are unlikely to make the enormous investment required [by broadband deployment] if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment." *Triennial Review Order* ¶ 3.[7] Indeed, continuing to enforce unbundling obligations against these second-tier players in the broadband market would perversely enhance the odds that cable companies will eventually monopolize that market completely.[8]

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7 *See Triennial Review Order* ¶ 272 ("consumers will benefit from [the] race to build next generation networks and the increased competition in the delivery of broadband services"). The same is necessarily true of the section 10(b) mandate to consider whether forbearance will promote "competitive market conditions." 47 U.S.C. § 160(b).

8 For similar reasons, there is no merit to AT&T's bizarre argument that Verizon should be forced to unbundle broadband and next-generation capabilities precisely because cable companies have no corresponding obligation to provide them to CLECs. The Commission has already found that CLECs are capable of building broadband facilities of their own, and in all events it would be arbitrary and capricious to subject a secondary player in a given market to greater regulatory burdens than the clear market leader on the theory that those burdens must be borne by *somebody*.

Some CLECs assert that, despite the dominance of cable companies in the broadband market, ILECs will continue to occupy a special status because cable companies are not widely providing *bundles* of voice and data services in light of their "slow entry into the voice market." Sprint Opp. at 16; *see also* AT&T Opp. at 30. This is untrue on three levels. First, the Commission has properly defined the relevant market, for purposes of assessing the need for any unbundling of broadband-specific elements, as the *broadband market, see, e.g., Triennial Review Order* ¶¶ 212-13, 292, and that market is indisputably subject to fierce competition, *id.* ¶ 292. Second, cable telephony is already available to more than 15 million U.S. homes—approximately 15 percent of the mass market[9]—and cable operators are adding tens of thousands of new subscribers each month.[10] And cable telephony will become even more widely available in the near future, as cable operators throughout the country have begun deploying commercial

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[9] Comcast Press Release, *Comcast Full Year and Fourth Quarter Results Meet or Exceed All Operating and Financial Goals* (Feb. 27, 2003); Cox Communications Press Release, *Cox Communications Announces Fourth Quarter Financial Results for 2002; Strong Demand for Cox's Digital Services Builds Solid Foundation for Continued Growth in 2003* (Feb. 12, 2003); Cablevision Systems Press Release, *Cablevision Systems Corporation Reports Fourth Quarter 2002 Financial Results* (Feb. 11, 2003); RCN Press Release, *RCN Announces Fourth Quarter and Year-End 2002 Results* (Mar. 13, 2003); Charter Press Release, *Charter Announces 2002 Operating Results and Restated Financial Results for 2001 and 2000; Company Will Extend Filing of Form 10-K* (Apr. 1, 2003); Insight Communications Press Release, *Insight Communications Announces Fourth Quarter and Year-End 2002 Results* (Feb. 25, 2003); Knology, Inc., Form 10-K (SEC filed Mar. 31, 2003).

[10] Reply to Comments and Petitions to Deny Applications for Consent to Transfer Control of AT&T Corp. and Comcast Corp. at 11, *Applications for Consent to the Transfer of Control of Licenses Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, filed in MB Docket No. 02-70, May 21, 2002, at 11 ("AT&T Broadband is capable of serving approximately seven million households, has enrolled over 1.15 million cable telephony customers, and is adding approximately 40,000 customers per month.").

voice-over-IP services.[11] Investment analysts have pointed to cable companies' rollout of cable telephony as "the largest risk to Bell fundamentals over the next 5 years," noting that "the impact on margins is increasingly evident today."[12] Third, cable modem service can serve as a platform for high-quality voice applications *even if the cable provider itself does not provide them.* For example, anyone can plug a Vonage phone into a cable modem and instantly receive a substitute for wireline voice service. This development, combined with the increasing willingness of wireless customers to "cut the cord," makes it all the more necessary to free the Bell companies from anomalous regulatory burdens in this ruthlessly competitive landscape.[13]

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[11] *See* A. Breznick, *Major MSOs Prepare for Full-Scale Rollouts of VoIP Service*, Cable Datacom News (Nov. 2003) (noting that Time Warner Cable, Cablevision Systems, Cox Communications and Comcast Corp., as well as many small cable operators, have all either already introduced commercial voice-over-IP services or are lanuching "soft" market rollouts or large market trials); *see also* D. Willis, *Cable Calling*, Asbury Park Press (Nov. 23, 2003) available at http://www.app.com/app/story/0,21625,859803,00.html (Cablevision Systems now offers voice-over-IP services in New Jersey, New York, and Connecticut); "Cox Digitial Telephone," available at http://www.cox.com/telephone/Frequently%20Asked%20Questions.asp (visited on Nov. 26, 2003) (Over 350,000 customers have already switched to Cox's telephony service); *Time Warner Expands VoIP*, Broadband Reports.com (Sept. 1, 2003) (Time Warner plans to launch voice-over-IP services in North Carolina and New York, in addition to its current Maine offering, within the next few months).

[12] John Hodulik, *Cable Telephony Competition: Who Gets It?*, UBS Investment Research, at 1 (Aug. 7, 2003).

[13] *See* Alex Salkever, *Why the Bells Should Be Very Scared; Free Voice Calls Transmitted Over the Internet Are Fast Becoming Mainstream. To Survive, Today's Phone Companies Must Adjust, Radically*, Business Week Online (Nov. 11, 2003) ("twisted copper is on the verge of giving way to the Internet"); *ILECs 'Doomed' By Next-Generation Networks, Experts Say*, Communications Daily (Nov. 10, 2003) (quoting John McQuillan, co-chairman of Next Generation Networks: "U.S. ILECs are in mortal peril" due to voice-over-IP); Reinhardt Krause, *With Broadband, Bundling, SBC Aiming for Comeback*, Investor's Business Daily (Nov. 14, 2003) ("[t]he growth of VoIP, or voice over Internet protocol, is also [in addition to wireless] threatening the Bells."); *see also FCC Reports Wireless Sub Growth is Leveling, Mobile is on Rise*, Communications Daily (June 27, 2003) (estimating that wireless traffic has displaced 30 percent of total wireline minutes); Business Wire, *Consumers Abandon Landlines and Increase Mobile Call Volumes, Creating Strong Growth in the Wireless Market, Reports Yankee Group*

Although the CLECs argue otherwise (*e.g.*, AT&T Opp. at 18), application of a section 271 unbundling requirement to Verizon's broadband elements would create the same investment disincentives that the Commission intended to eliminate in the *Triennial Review Order*, even though the pricing of those elements would be governed by yet-to-be-determined standards under section 201 rather than TELRIC. As the D.C. Circuit has recognized, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *USTA*, 290 F.3d at 427. These concerns are most pronounced in the case of next-generation packet-switched networks because, as Verizon explained in its October 24 *ex parte* (at 9-13), that is the context in which research and development costs are most forbidding and where "the tangled management inherent in shared use of a common resource," *USTA*, 290 F.3d at 429, is most problematic.

For example, in such a network, packets travel from various end users over virtual channels, undifferentiated until they reach the destination packet switch. There is no inherent need for an intermediate access point from which CLEC traffic may be redirected to the CLEC's switch. In fact, new packet-switched fiber networks are being built that are not designed to accommodate access by multiple carriers. Any unbundling requirement would thus require a costly redesign of the network, not only by Verizon but by its equipment suppliers as well, to create access points to perform an intermediate packet-switching function. And, as discussed in Verizon's October 24 *ex parte*, any such requirement would also require ILECs to develop and

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(Sept. 16, 2002) (predicting that, by 2006, U.S. mobile subscribers will increase by 50% and will "dominate personal calling and severely cannibalize landline minutes of use.").

implement expensive new systems to provision and track orders, send out bills, and provide maintenance access for the various providers using individual broadband elements.[14]

Unbundling obligations would further undermine investment incentives by subjecting Verizon to a shifting range of regulatory requirements. As demonstrated by Verizon's experience in the context of its section 251 obligations, any unbundling requirement evolves over time as it is interpreted and applied, and thus requires carriers to continually modify both their underlying networks and the accompanying network operations and support systems in order to comply with the changing regulations. Applying an unbundling obligation to broadband facilities would add another layer of uncertainty and financial risk that would depress the investment incentives of any rational business. An unbundling requirement also would subject Verizon to the threat of intrusive state regulation,[15] as well as investment-deterring litigation over the pricing of elements. Rather than addressing these realities, the CLECs venture the self-ridiculing argument that the existing regulatory uncertainty about broadband deployment "is solely the product of Verizon's unrelenting requests to be relieved of its unbundling obligations." MCI Opp. at 16.

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[14] MCI is wrong in asserting that Verizon's proposed Packet at the Remote Terminal Service ("PARTS") offering proves that ILECs could unbundle components of next-generation networks without such network redesign. The PARTS service was designed to provide access to xDSL service over legacy facilities and existing network architectures that already provide intermediate access points to CLECs. As such, it is irrelevant to the unique challenges presented by forced access to next-generation broadband networks.

[15] As noted in Verizon's October 24 *ex parte*, although the Commission clarified in the *Triennial Review Order* that the TELRIC rules do not apply to elements unbundled under section 271 alone, CLECs have already argued to state regulators that they have a right to oversee—*i.e.*, intrusively regulate—these federal obligations.

Equally disingenuous is the CLECs' claim that Verizon's request here is somehow inconsistent with Verizon's prediction in the *Triennial Review Proceeding* that, absent unbundling obligations, ILECs would still have every incentive to provide wholesale service offerings over their next-generation networks on negotiated, commercially reasonable terms. The CLECs point to a section of the *Order* in which the Commission acknowledged that LECs would likely make broadband service available on a wholesale basis:

> [W]e expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops. Of course, the terms and conditions of such access would be subject to sections 201 and 202 of the Act

Triennial Review Order ¶ 253. But this statement, which refers to the ILECs' *voluntary* offering of wholesale services in the mutual interest of CLECs and ILECs alike, has no bearing on the issue of whether BOCs should be *compelled* to unbundle elements of their next-generation broadband networks. Because they face intense intermodal competition from the dominant cable modem platform, ILECs will need to find ways to keep traffic "on-net" to cover their enormous capital investments, including through the provision of wholesale service offering to independent service providers. As Verizon previously explained at length, the question here is a very different one: whether ILECs will have to unbundle elements of their new broadband networks subject to as-yet undefined and (if experience is any guide) constantly shifting regulatory prescriptions as to what must be unbundled and at what price, accompanied by "the tangled management inherent in shared use of a common resource." *USTA*, 290 F.3d at 429. The answer to that question should be a resounding no. As AT&T itself told the Commission scarcely three years ago, "fundamental economic truths" establish that "[n]egotiated agreements, rather than government mandates, are the most appropriate means for creating and defining access relationships."[16] Those truths still apply.

Finally, any doubt on any of these issues should be resolved by the Commission's mandate under section 706(a) to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" through "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment." In the *Advanced Services Order*, the Commission made clear that section 706 operates as a thumb on the deregulatory side of the balance when the Commission considers forbearing from unnecessary *broadband* regulation.[17] The CLECs contend that section 706 "is irrelevant to the scope of a BOC's access obligations under section 271," reasoning (i) that the Commission could consider section 706 in addressing section 251 unbundling obligations only by virtue of the "at a minimum" clause of section 251(d)(2) and (ii) that there is no such clause in section 271. AT&T Opp. at 19; *see also* MCI Opp. at 11; Z-Tel Opp. at 5. This makes no sense. Just as the *Triennial Review Order* makes clear that section 706 is relevant to the broadband unbundling analysis,[18] the *Advanced*

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16 Comments of AT&T Corp., Notice of Inquiry, filed in GN Docket 00-185, Dec. 1, 2000 at 80. Whether these voluntary service offerings would be subject to traditional common carriage obligations is a separate question presented in the Commission's pending inquiry into wireline broadband obligations. *See* Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3042 ¶ 51 (2002).

17 *See Advanced Services Order*, 24045 ¶ 69 ("section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services").

18 *See Triennial Review Order* ¶ 288 (broadband unbundling obligations would stand "in direct opposition to the express statutory goals authorized in section 706" because they would "blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities").

Services Order unequivocally declared that section 706 is relevant to the Commission's application of section 10, which is at least as subject to interpretation as section 251(d)(2). There is no plausible basis for second-guessing that determination here.

B. Neither Section 271(d)(4) Nor Section 10(d) Bars The Commission From Forbearing From Vestigial Checklist Obligations.

The CLECs argue that section 271(d)(4), which provides that the Commission may not "limit or extend the terms used in the competitive checklist," bars the Commission from forbearing here. That argument is untenable. Section 10 grants the Commission broad authority to forbear from applying "*any* provision of this [Act]." 47 U.S.C. § 10(a) (emphasis added). And section 10 specifically provides that the Commission must forbear from applying section 271 requirements if those requirements have been "fully implemented" and the three criteria set forth in subsection 10(a) are satisfied. Section 271(d)(4), in contrast, speaks to a different set of issues: the Commission's default authority to interpret the Communications Act flexibly in the *absence* of forbearance. Like many other such provisions throughout the Act, it does not remotely qualify the Commission's mandate to forbear when the standards of section 10 are met. Instead, it directs the Commission to ensure full implementation of the checklist before granting a section 271 application, at which point the checklist requirements are "fully implemented" for purposes of section 10(d) and are thus eligible for forbearance under section 10(a), as discussed below. This position places sections 10 and 271(d)(4) in harmony, whereas the CLECs' contrary position would place them in needless conflict. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.") (internal citations omitted). And, in all events, even if these two provisions were in conflict, section 10 would prevail as the more "specific" of the two on the issue presented here:

section 271(d)(4) does not even mention forbearance or section 10, whereas section 10 expressly refers to section 271 and governs the terms of the Commission's forbearance authority with respect to section 271 requirements.

Nor is there any merit to the CLECs' contention that section 10(d) precludes the Commission from granting forbearance once a section 271 application has been granted. Section 10(d) authorizes forbearance from "the requirements of section . . . 271" where "those requirements have been fully implemented." 47 U.S.C. § 160(d). The Commission has already expressly found that the requirements at issue here — those of the competitive checklist — have been "fully implemented," because that is an explicit statutory prerequisite to granting any section 271 application. 47 U.S.C. § 271(d)(3)(A)(i).

Unable to dispute that the "normal rule of statutory construction" is "that identical words used in different parts of the same act are intended to have the same meaning," *Lundy*, 516 U.S. at 250 (internal quotations omitted), the CLECs argue that the rule should be ignored here on the theory that application of the rule "would lead to an absurd result and ignore the differing purposes of the sections," AT&T Opp. at 15. But just the opposite is true. First, section 10 *cross-references* section 271 in the very subsection at issue, and it is inconceivable that Congress used the same language by accident to describe these interrelated bases for gaining deregulatory relief. Second, construing the language to mean the same thing in each provision would produce a perfectly sensible result, not an "absurd" one. It would remove, once a section 271 application is granted, an extraneous statutory obstacle to the Commission's freedom to exercise its own best judgment about whether forbearance is warranted or not under section 10(a).

It is thus nonsensical to claim, as AT&T does, that this construction of section 10(d) will produce "anticompetitive and counterintuitive results that run headlong against the goals of the

1996 Act." AT&T Opp. at 12. As Verizon made clear in its October 24 *ex parte* (and previously), there is no dispute that the competitive checklist requirements remain in effect after the Commission has granted section 271 authorization in a given state. The only question is whether, once such authorization has been granted, section 10 allows the Commission to forbear from applying particular checklist requirements if it determines that forbearance is in the public interest and otherwise meets the independent criteria of section 10(a). At bottom, AT&T is left with the unenviable argument that it is "absurd" to give this Commission greater discretion to remove requirements that harm the public interest.

Finally, both the statutory text and Commission precedent foreclose the CLECs' argument that section 10(d) prohibits the Commission from forbearing from *any* particular section 271 requirement until section 271 *as a whole* has been "fully implemented." *See* MCI Opp. at 17; AT&T Opp. at 15-16.[19] Section 10(d) itself makes clear that only "*those* requirements" from which the BOC is seeking forbearance must be "fully implemented" before the Commission is authorized to forbear. 47 U.S.C. § 160(d) (emphasis added). And the same conclusion follows from the Commission's recent *OI&M Forbearance Order.* There the Commission held that section 10(d) barred it from forbearing from applying section 272 requirements because those requirements—which the Commission found were incorporated by reference as requirements of section 271—had not been "fully implemented." *OI&M Forbearance Order* ¶ 5. The Commission noted, however, that "[its] analysis . . . applies only to

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19 AT&T goes so far as to argue that the Commission lacks authority to forbear from a single requirement of section 251(c) *or* section 271 until every other such requirement has been satisfied, whether or not it bears any conceivable relationship to the requirement as to which forbearance is sought. As explained below, AT&T's nonsensical interpretation of section 10(d) directly contradicts the Commission's reasoning in the *OI&M Forbearance Order.*

whether section 271 is 'fully implemented' *with respect to the cross-referenced requirements of section 272*, and does not address whether *any other part of section 271, such as the section 271(c) competitive checklist*, is 'fully implemented.'" *Id.* ¶ 6 (emphasis added). This passage confirms two things: first, that AT&T is quite wrong to rely on the *OI&M Forbearance Order* as support for its opposition to forbearance from checklist requirements (*see* AT&T Opp. 10-11) and, second, that the "fully implemented" language of section 10(d) applies on a granular basis to the specific requirements of section 271 from which a Bell company seeks forbearance.

II. Section 271 Should Not Be Read To Require The Unbundling Of Elements That (1) The Commission Has Removed From The Section 251 Unbundling List And (2) Are Specific To Broadband Markets In Which Bell Companies Trail Other Providers

In its October 24 *ex parte*, Verizon showed that forbearance is particularly appropriate in this context because any separate unbundling obligation that may exist under section 271 could properly be read not to extend to broadband, and because the statutory purposes behind section 271 are not implicated in the broadband context. Granting forbearance is the most straightforward way to remove any doubt on this score.

The CLEC response is long on rhetoric and short on substance, and it begins with a mischaracterization. In connection with this forbearance petition, Verizon is *not* arguing that an element is automatically exempt from unbundling under section 271 *either* if the Commission has excluded it from the section 251 list *or* if it relates to broadband services. Instead, for present purposes, Verizon is arguing that the Commission should forbear from any obligation that might otherwise apply if the Commission has excluded it from the section 251 list *and* it is specific to broadband services. And Verizon's additional point here is simply that forbearance is particularly appropriate both because there is a significant question as to whether any separate unbundling obligation under section 271 should be read to extend to broadband elements, and because the purpose underlying section 271 simply is not implicated in this context.

This makes abundant sense. As noted, "[t]he Commission's own findings . . . repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market," *USTA*, 290 F.3d at 429, and it would be irrational to read into section 271 a forced sharing obligation that the Commission has rightly declined to impose on these second-tier broadband providers under section 251, since section 271 is designed to address the Bell companies' traditional market power in the separate narrowband telephony market. It is no answer to say that, with respect to hybrid loops, the Bell companies would be making use of legacy facilities to provide broadband services. Rightly or wrongly, the *Triennial Review Order* preserves full CLEC access to the legacy functions of mass market ILEC loop facilities under section 251. The question here is whether section 271 should be construed to give CLECs access to the *non-legacy* packet-switched functionality of these loops, or to fiber-to-the-premises network elements, which "incumbent LECs have not widely deployed" and which, as the Commission has found, may *not* be deployed in an environment of regulatory uncertainty. *Id.* ¶ 290; *see also id.* ¶¶ 272, 295. Granting CLECs such access under section 271, when the Commission has rightly foreclosed it as both unnecessary and harmful under section 251, would make no legal or policy sense.

Indeed, the Commission has embraced precisely this point in several section 271 orders, which the CLECs labor in vain to distinguish. As explained in Verizon's October 24 *ex parte* (at 15-17), the Commission has repeatedly granted section 271 applications over CLEC objections that the Bell companies have violated checklist items 4 and 6 by failing to provide access to broadband-specific elements that the Commission has excluded from the section 251 list. The CLECs, however, try to explain away these precedents by contending that, in each case, the Commission was *really* deciding only that the Bell company had complied with checklist item 2, which explicitly incorporates section 251 unbundling requirements by reference, rather than checklist items 4-6, the requirements at issue here. *See, e.g.*, MCI Comments at 27.

This is wrong on two levels. First, it misrepresents these section 271 orders even as a formal matter. For example, in the *Qwest 9-State Order*, the Commission upheld Qwest's denial of access to the packet switching element under *checklist item 6*, not checklist item 2, and it did so because the Commission had sharply limited any corresponding obligation to provide access to that element under section 251.[20] Likewise, in the *Texas 271* Order, the Commission rejected AT&T's complaint that denial of access to the splitter was a violation of *checklist item 4*, again because of prior determinations under section 251.[21] In all events, even if the Commission had addressed these issues under checklist item 2, which it did not, it would be inconceivable that the Commission and all interested CLECs could have simply overlooked an independent obligation to provide access to the same elements under these other checklist items. In sum, the CLECs cannot square their overbroad theory of section 271 unbundling obligations with Commission

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20 Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, 17 FCC Rcd 26303, 26502-03 ¶¶ 370, 371 (2002) ("*Qwest 9-State Order*").

21 Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company and Southwester Bell Communications Services, Inc. d/b/a Southwester Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, 18516-17 ¶ 327 (2000) ("*Texas 271 Order*"). Contrary to MCI's argument (at 27-28), this determination did *not* rest on a finding that the splitter was not an "element." Instead, the Commission viewed the splitter as a component either of the loop or of the packet-switching element, assumed *arguendo* that it is "part of the packet switching element," and found that the checklist imposes no obligation to unbundle it "because we declined to exercise our rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the packet switching element." *Id.*

precedent. That precedent is correct for the reasons stated in Verizon's October 24 *ex parte*, and it further reinforces the reasons that the Commission should grant the forbearance sought here.

Conclusion

For the reasons stated above, the Commission should forbear from applying any stand-alone section 271 unbundling requirement to Verizon's broadband elements.

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